

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BROWN)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

SIOUX FALLS LODGING ASSOCIATES,)
LLC,)

Civ. No. ____-____

Plaintiff,)

COMPLAINT

vs.)

TOTAL FRAMING AND DRYWALL,)
LLC,)

Defendant.)

COMES NOW the Plaintiff, Sioux Falls Lodging Associates, LLC, by and through its attorney of record, John W. Burke, and for its causes of action states and alleges as follows:

GENERAL ALLEGATIONS

1. That Sioux Falls Lodging Associates, LLC ("S.F. Lodging") is, and at all times relevant to this matter was, a limited liability company duly organized and existing under the laws of the state of South Dakota, with its principle place of business in Aberdeen, South Dakota.

2. That Defendant Total Framing and Drywall, LLC ("Total Framing & Drywall") is, and at all times relevant to this matter was, a limited liability company duly organized and existing under the laws of the state of North Dakota, with its principle place of business in Dickinson, North Dakota.

3. That in February of 2015, S.F. Lodging and Total Framing & Drywall entered into a *Subcontract Agreement* whereby Total Framing & Drywall agreed to perform certain

drywall work required in connection with the construction of a TownePlace Suites Hotel located in Sioux Falls, South Dakota.

4. That construction of the TownePlace Suites Hotel commenced in 2014.
5. That in the *Subcontract Agreement*, Total Framing & Drywall agreed, among other things:
 - (a) to "complete the Work pursuant to th[e] Agreement," and "pursuant to th[e] Contract Documents;"
 - (b) that "[a]ny additions or changes to the Scope of the Work [could] only be made pursuant to a written change order pre-approved by [S.F. Lodging];"
 - (c) to "provide and pay for all labor . . . including proper supervision at all times at the Project site, as required for the full and proper completion of the Work, and all work incidental to the completion of the Work;"
 - (d) to complete all Work "in a good and workmanlike manner according to the Contract Documents and as directed by [S.F. Lodging]," and to Owner's satisfaction;
 - (e) to not discontinue performance of the Work "unless such a discontinuance [wa]s authorized, in writing, by [S.F. Lodging];"
 - (f) to "complete its Work in a timely manner which d[id] not delay any other work performed by [S.F. Lodging] and other subcontractors of the Project;"
 - (g) to be liable for liquidated damages in the amount of \$1,000 per day if it, "through [its] negligence or wrongful acts, fail[ed] to complete the Work on or before the time for completion . . . ;"

- (h) that “[i]f any lien [wa]s filed and [wa]s not removed by [Total Framing & Drywall] within thirty (30) days after filing, [S.F. Lodging] [could] deduct from any sums owed to [Total Framing & Drywall], an amount equal to the amount of any filed lien multiplied by two and one-half (2 ½) . . . ;”
- (i) that Total Framing & Drywall would “receive no payment on any change in the Work, or for additional work, unless the changed Work or additional work have been preapproved, in writing, with a change order form executed by Chris Lamont or his authorized Project representative . . . ;”
- (j) that if Total Framing & Drywall defaulted in the performance of any of its obligations under the *Subcontract Agreement*, S.F. Lodging had the right, among other things, to terminate the agreement, and “take over all Work in progress and complete [Total Framing & Drywall’s] Work or hire another subcontractor to complete [Total Framing & Drywall’s] Work,” and that all costs incurred by S.F. Lodging would “be paid, or reimbursed, by [Total Framing & Drywall];”
- (k) that any time that Total Framing & Drywall owed any amount to S.F. Lodging, or was required to reimburse S.F. Lodging, S.F. Lodging “[wa]s authorized to deduct any sums owed from any amount that may be due to [Total Framing & Drywall];” and
- (l) if either party “retain[ed] legal counsel to enforce any rights or the other party’s obligations pursuant to this Agreement or applicable law, the prevailing party in any action, claim, arbitration, or mediation shall be entitled to recover attorney’s fees and the costs of such enforcement action.”

6. That in connection with its work on the TownePlace Suites Hotel, Total Framing & Drywall failed to timely and fully honor the *Subcontract Agreement*. Among other things, Total Framing & Drywall's workmanship was defective and/or poor, it was not timely in the completion of its work, and it did not complete all of its work.

7. That S.F. Lodging secured a temporary *Certificate of Occupancy* on October 30, 2015.

8. That as a direct and proximate result of Total Framing & Drywall's failure to timely and fully honor the parties' contract, and defective and/or poor workmanship, S.F. Lodging suffered, and is continuing to suffer, damages.

COUNT 1 - BREACH OF CONTRACT

9. S.F. Lodging hereby incorporates by reference Paragraphs 1 through 8, inclusive, as though they were fully set forth herein.

10. That when Total Framing & Drywall entered into the *Subcontract Agreement*, it became contractually bound to S.F. Lodging to take certain actions and perform certain work.

11. That Total Framing & Drywall breached the parties' contract in at least the following respects:

- (a) providing defective and/or poor workmanship, which resulted in S.F. Lodging having to incur cost and expense correcting the same;
- (b) failing to complete its work, including identified punch list items, which resulted in S.F. Lodging having to incur cost and expense completing the same;
- (c) failing to timely complete its work, which resulted in delays to other subcontractors and delay of the project;

(d) failing to provide supervision for its employees on the project, which resulted in S.F. Lodging having to incur cost and expense providing the same; and

(e) filing a lien against the TownePlace Suites Hotel property.

12. That as a direct and proximate result of Total Framing & Drywall's breach of the parties' contract, S.F. Lodging suffered, and is continuing to suffer, damages.

COUNT 2 - BREACH OF IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE

13. S.F. Lodging hereby incorporates by reference Paragraphs 1 through 12, inclusive, as though they were fully set forth herein.

14. That the parties' contract contained an implied warranty that Total Framing & Drywall would perform its work in a skillful, careful, diligent, and workmanlike manner and that its work would be reasonably fit for its intended purpose.

15. That Total Framing & Drywall breached this implied warranty by failing to perform its work in a skillful, careful, diligent, and workmanlike manner, and by failing to complete its work such that it was reasonably fit for its intended purpose.

16. That, as a direct and proximate result of Total Framing & Drywall's breach of this implied warranty, S.F. Lodging suffered, and is continuing to suffer, damages.

COUNT 3 - NEGLIGENCE

17. S.F. Lodging hereby incorporates by reference Paragraphs 1 through 16, inclusive, as though they were fully set forth herein.

18. That Total Framing & Drywall had a duty to use reasonable care in the performance of its work on the TownePlace Suites Hotel.

19. That Total Framing & Drywall breached this duty of care in connection with the

performance of its work on the TownePlace Suites Hotel.

20. That as a direct and proximate result of Total Framing & Drywall's negligence, S.F. Lodging suffered, and is continuing to suffer, damages.

COUNT 4 - FRAUD

21. S.F. Lodging hereby incorporates by reference Paragraphs 1 through 20, inclusive, as though they were fully set forth herein.

22. That Total Framing & Drywall carried out certain acts designed to deceive S.F. Lodging, including, but not limited to, knowingly, intentionally, and in bad faith filing a lien that was false, and in an amount (\$80,231.28) that was exaggerated and well in excess of any sum that Total Framing & Drywall could reasonably allege to be owed, thereby defeating the lien.

23. That in carrying out this act, Total Framing & Drywall:

- (a) Suggested as a fact, something that was not true and which it did not believe to be true (i.e., that it was owed \$80,231.28 for work performed on the TownePlace Suites Hotel);
- (b) Made a positive assertion, in a manner not warranted by the information in its possession, or of things that were not true, though it may have believed such things to be true (i.e., that it was owed \$80,231.28 for work performed on the TownePlace Suites Hotel); and
- (c) Otherwise made representations and carried out certain acts in connection with the filing of the lien designed to deceive.

24. That as a direct and proximate result of Total Framing & Drywall's fraud, S.F. Lodging suffered, and is continuing to suffer, damages.

25. That Total Framing & Drywall's conduct was fraudulent, malicious, intentional, and/or willful and wanton, thereby entitling S.F. Lodging to punitive damages to punish, and make an example of, Total Framing & Drywall.

WHEREFORE, S.F. Lodging respectfully requests that this Court enter a judgment against Total Framing & Drywall granting the following relief:

- (a) General, special, and punitive damages to be proven at trial;
- (b) Any and all costs and disbursements incurred in this action, including attorney's fees;
- (c) Pre and post-judgment interest; and
- (d) For such other and further relief as the Court may deem equitable and just under the circumstances.

Dated this 9th day of September, 2016.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Sioux Falls Lodging Associates, LLC

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PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY ON ALL ISSUES

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

SIOUX FALLS LODGING ASSOCIATES, LLC,

Civ. No. 16-406

Plaintiff,

JUDGMENT OF DISMISSAL

vs.

TOTAL FRAMING AND DRYWALL, LLC,

Defendant.

Based upon the *Stipulation for Judgment of Dismissal* entered into by the parties and filed with the Court, it is hereby:

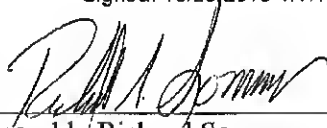
ORDERED, ADJUDGED AND DECREED that the above-captioned action and all claims therein are hereby dismissed, with prejudice, and without costs to either party.

BY THE COURT:

Signed: 10/29/2018 4:17:18 PM

Attest:
Walberg, Peggy
Clerk/Deputy





Honorable Richard Sommers
Fifth Circuit Court Judge